United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-2057

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

GREGORY A. JOHNSON Petitioner - appellant VS. COMMANDING OFFICER, USS CASIMIR PULASKI (SSBN 633) BLUE CREW UNITED STATES NAVY, GROTON, CONNECTICUT Defendant - appellee	:	DOCKET NO: 76-2057

B
P/s

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES

Did the District Court err in finding a basis in fact for denying Gregory A. Johnson's petition for discharge from the United States Navy as a conscientious objector?

I STATEMENT OF THE CASE

Gregory A. Johnson enlisted in the United States Navy on August 5, 1971. (A-28) He applied for a discharge as a conscientious objector on November 8, 1974. (A-67) By letter dated June 4, 1975, the Chief of Naval Personnel informed Johnson that he had "failed to prove beyond a reasonable doubt that your beliefs are held with the strength and conviction of traditional religious beliefs ....". (A-58)

Johnson then filed a petition for Writ of Habeas Corpus, seeking a separation and discharge from military service on the basis of conscientious objection, in the United States District Court for the District of Connecticut. On November 13, 1975, the District Court issued a restraining order and scheduled a hearing on the habeas corpus petition. (A-12) At the hearing on November 21, 1975, the Government moved to remand the matter back to the Department of the Navy because the "beyond-a-reasonable-doubt-standard" applied by the Chief of Naval Personnel violated military regulations, Department of Defense Directives 1300.6. The District Court granted the motion and remanded the case to the Navy for reconsideration, the temporary restraining order remaining in effect. (A-2)

By letter dated January 22, 1976, the Chief of Naval Personnel again informed Johnson, although this time for different reasons, that his application was disapproved. (A-102, A-103) Johnson then filed a Motion for Evidentiary Hearing and was heard by the District

Court on February 23, 1976. By memorandum of decision dated May 14, 1976, the District Court denied the petition for a writ of habeas corpus. Gregory A. Johnson is now appealing that decision, rendered by the Honorable Robert C. Zampano. (A-16)

II FACTS

Gregory A. Johnson enlisted in the United States Navy when he was eighteen years old. (A-28) At the time he had just graduated from high school. (A-69) Up to the time he enlisted in the Navy, Johnson had lived a normal middle-class American life. Although raised in a strict Episcopalian home, he had never considered moral or ethical questions very deeply. (A-68)

The first two years of his Navy service were emotionally traumatic for Johnson. Isolation from his family and personal solitude caused him to begin to question both his own purpose and the purpose of the military. At the same time, two friends, Thomas Deagel and Petty Officer Third Class Woodward discussed Christianity and philosophy with him at length. At this time he also read a book called Lao Tzu's Tao and Wu Wei. These experiences began his philosophical development as a conscientious objector. (A-69)

In mid 1973 Mr. Johnson was hospitalized for four months for surgery. While hospitalized he read a second major stimulant to his philosophical development, Autobiography of a Yogi by Paramahansa Yogananda. (A-69, A-70)

As time went on, as a result of these texts, discussions, and his own introspection, Johnson developed a new philosophy of life and understanding of God. He makes no claim that his philosophy follows the exact teaching of any one writer, but rather that it is

a synthesis of all the philosophical influences he has experienced. (A-70, A-71, A-72)

Central to Petitioner's new philosophy and understanding of God are the ideas that spiritual evolution is the way to God, that one must follow the orders of legitimate authority until that authority is removed, that material possessions are unimportant, that taking of life is wrong both because of its damage to the being which is killed and because it damages the spirit of the killer, and that he could not participate in the taking of conscious life. (A-70, A-71, A-72)

Johnson's philosophy has developed over time. In August 1974 he requested consideration as a conscientious objector. (A-62, A-84) He was faced, however, with vehement opposition from his parents, obstacles in the chain of command, and a lack of time to fully prepare his case. He withdrew his request at that time, though he had never submitted a written statement of his beliefs. (A-70, A-84) He was then transferred to the nuclear submarine base at Holy Loch, Scotland. Because of his close contact with the nuclear submarines there, and being forced to consider their enormous destructive power, his developing philosophy crystallized, so that he felt he must formally apply for conscientious objector status. He did so on November 8, 1974. (A-70, A-83)

In accordance with the Bureau of Naval Personnel Manual, Johnson was interviewed by a psychiatrist, a medical officer, two chaplains, and an investigating officer. The reports of these officers, together with Johnson's application and supporting evidence, were reviewed by the Chief of Naval Personnel, Bureau of Naval Personnel, Department of the Navy, Washington, D.C. (A-60 -- A-86)

By communication dated June 4, 1975, Petitioner was informed by the Department of the Navy that his application for discharge had been disapproved. (A-58) In the letter dated June 4, 1975, the Chief of Naval Personnel stated that Johnson had failed to prove beyond a reasonable doubt that he qualified as a conscientious objector. The application of this standard was in violation of the Bureau of Naval Personnel Manual Section 1860120 and Department of Defense Directive 1300.6. On November 21, 1975, Petitioner's case was remanded to the Department of the Navy for reconsideration under the proper standard.

By communication dated February 5, 1976, Petitioner was informed that his application had again been disapproved. (A-102, A-103) That letter stated in part:

> Specifically, it was concluded that you are not sincere in your asserted beliefs of conscientious objection. In addition, it is not clear that you are in opposition to war in any form.

III STANDARD FOR JUDICIAL REVIEW

A) The Basis-In-Fact Test

The scope of review in a discharge case such as this, as in the cases dealing with denial of conscientious objector status by the Selective Service, is the narrow one of whether there exists in the record a "basis in fact" for the denial of an in-service applicant's application for classification as a conscientious objector. U.S. ex rel Donham v. Resor, 436 F.2d 751 (2nd Cir. 1971); Smith v. Laird, 486 F.2d 307 (5th Cir. 1973); U.S. ex rel Robinson v. Laird, 457 F.2d 741, (7th Cir. 1972); Foster v. Schlesinger, 520 F.2d 751 (2nd Cir. 1975).

To qualify for discharge from the armed forces as a conscientious objector, an applicant must establish that:

1. He is opposed to war in any form. Gillette v. United States, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2nd 168 (1971).

2. His objection is grounded upon religious principles as enunciated in Welsh v. United States, 398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed.2d 308 (1970), and United States v. Seeger, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965).

3. His beliefs are sincerely held, Witmer V. United States, 348 U.S. 375, 75 S.Ct. 392, 99 L.Ed. 428 (1955). See also, Smith v. Laird, supra at 309-10; Singer v. Secretary of the Air Force, 385 F.Supp. 1369 (D.C. Colo. 1974); Clay v. United States, 403 U.S. 698, 91 S.Ct. 2068, 29 L.Ed.2d 810 (1971).

Once an applicant has made out a prima facie case for classification as a conscientious objector, then, as the court said in Smith v. Laird:

> ...[i]t is incumbent upon the government to show a basis in fact in the record for the denial of his application. A basis in fact will not find support in mere disbelief or surmise as to the applicant's motivation.
>
> Rather, the government must show some hard, reliable, provable facts which would provide a basis for disbelieving the applicant's sincerity, or it must show something concrete in the record which substantially blurs the picture painted by the applicant.
>
> Smith v. Laird, 486 F.2d 307, 310 (5th Cir. 1973)

B) The Federal Court Is Limited To A Review Of The Reasons Given By The Bureau of Naval Personnel For Denying Johnson's Discharge and Cannot Independently Search The Record To Reconstruct Other Reasons.

The law is well settled that a federal court is limited to a review of the reasons given by the military for denying an in-service conscientious objector application. In United States ex rel Checkman v. Laird, 469 F.2d 773 (2nd Cir. 1972), the court was reviewing the denial of an ROTC cadet's application for discharge as a conscientious objector. The Army's Conscientious Objector Review Board (CORB) had denied his application without giving reasons supported by adequate reference to facts in the record. The Government contended that:

> [A] court is not limited to ascertaining whether there is a "basis in fact" to support the reasons given in the CORB's decision, but may "search the record" for other factual evidence in support of the denial.
> 469 F.2d at 781.

The court reviewed prior cases in the Second Circuit on the question, then denied the government's contention, stating:

> Where there is a requirement of law that reasons be stated by executive officials or administrative agencies responsible for decisions, there is an implicit corollary that the decision must stand or fall on the basis of the reasons stated ....
>
> Otherwise a court, if it sustains a decision by recourse to reasons outside those specified, opens the door to an improper substituting of the court's judgment and evaluation of evidence in place of that of the agency (here the CORB) or official with responsibility. The court's judgment, its reasons and approaches, may not be acceptable to and may even have been discredited by the administrative officials responsible ....

> The proper focus of a reviewing court is on the reasons given by the CORB and not on reasons that may come to light if and when a court rummages throughout the record in an effort to reconstruct on what basis the board might have decided the matter. With this as our point of departure, we proceed to a consideration of the CORB's adverse decision on Checkman's application and the reasons it gave for that decision.
>
> 469 F.2d at 780-783.

IV THE DISTRICT COURT ERRED WHEN IT FOUND A BASIS IN FACT IN THE RECORD FOR DENYING PETITIONER'S APPLICATION FROM THE UNITED STATES NAVY AS A CONSCIENTIOUS OBJECTOR

A) When An Applicant Is Found To Be Sincere By The Individual Reviewing Military Officers, Then A Reviewing Body Cannot Make A Determination That The Applicant Is Insincere Based Upon The Timing of His Application.

The Chief of Naval Personnel, by letter dated January 22, 1976, determined that Gregory A. Johnson was not sincere and denied his application for a discharge:

> Based upon the factors set forth above and the record as a whole it must be concluded that you are not sincere in your asserted beliefs. Accordingly, your application for conscientious objector status is denied. (A-103)

Any fair review of the factors listed by the Chief of Naval Personnel shows that his conclusion has no basis in fact in the record. (A-103)

The Chief of Naval Personnel states, first, in paragraph 2a, that "No one who has personally interviewed you for the purpose of determining your beliefs have concluded that you are a sincere conscientious objector. A review of your application indicates that neither your commanding officer, the investigating officer, nor the chaplain who has had personal contact with you, are convinced of your sincerity." In fact, entirely the opposite was true; no one who interviewed Petitioner concluded that he was not sincere. Lt. Kraft, the investigating officer, said, "Petty Officer Johnson is sincere in the fact that he personally

believes his present beliefs qualify him for conscientious objector status. Everyone (medical/psychiatric/religious personnel) including myself have been convinced of that fact." (A-64) Petitioner's Division Officer (A-66), the medical officer reporting on February 28, 1974 (A-74), Dr. Farrier (A-75), Chaplain Dolaghan (A-76), Chaplain Purdham (A-77), and the doctor reporting on March 6, 1975 (A-78) all stated that Petitioner is sincere in his beliefs.

Chaplain Purdham found that: "The applicant is unquestionably sincere. Unfortunately, due to his age, limited life experiences and paucity of research in his major interest, his thoughts and decisions lack clarity." (A-75)

Chaplain Dolaghan found that: "Johnson is, I believe, sincere, as far as he can see at this time, but it is my belief that his insight is limited by his own limited life experience, and unresolved philosophical concepts." (A-76)

D.P.H. Farrier found: "From the interview I felt that he is basically sincere in his beliefs but that those beliefs are still far from crystallized in his mind. He is still groping for the 'truth' as he sees it and is having a great deal of difficulty reconciling his belief and the practicalities of daily living." (A-75)

The medical officer, in his evaluation dated February 28, 1974, found Johnson "does seem quite sincere," although that officer didn't think Johnson's philosophy "makes much sense." (A-74)

The clinical record consultation sheet dated March 6, 1975 as a result of a psychiatric interview, states: "This individual seems motivated by beliefs of a sincere nature." (A-51)

The record before the Bureau of Naval Personnel included Johnson's formal request for consideration as a conscientious objector. (A-65, A-66) In a notation on the back of that request, Johnson's Division Officer Roberts said: "Petty Officer Johnson seems sincere in his beliefs." (A-66)

Lt. Kraft, the officer who conducted a hearing on Johnson's application for discharge, also found Johnson sincere. (A-64)

When an applicant such as Gregory A. Johnson has presented his beliefs with sincerity and no adverse demeanor evidence has been presented, then the reviewing military body must present objective evidence affording a rational basis for disbelieving the applicant. Lovallo v. Resor, 443 F.2d 1262, 1264 (2nd Cir. 1971); Ferrand v. Seamans, 488 F.2d 1386, 1389 (2nd Cir. 1973). The District Court quite property rejected an alleged inconsistency as the objective basis to reject the claim. (A-20, A-25 fn2) The court, however, concluded that the military could reject Johnson's claims because he was slow in asserting them. (A-22 -- A-24) It is submitted that on the facts of this case, that conclusion is wrong.

In explaining why he withdrew his application while attending nuclear power school, Johnson said:

> I would like to add that at that time my parents were shocked at my application. The important fact was not that they disagreed with me but that they firstly did not understand the things that I said, and secondly they were afraid that I would became a disapinary (sic) problem. The reason for my discontinuation of this application at the time was not because of my parents feelings, but because my heart would not allow me to be swayed by my emotions. I could not become a disaplinary (sic) problem.

> After turning from my application at that time I had great difficulty in qualifying at Prototype. To do so I had to push my true feelings back inside. Otherwise I could not concentrate on my studies. This proved to be quite detrimental to me in that, in pushing spirituality far enough from my mind to qualify, I entered into a dormant stage concerning my spiritual path. It was not until the strong stimulation of seeing and feeling the presence of the nuclear warheads on the Casimir Pulaski was felt, that I broke free from this dormant state and once again became aware of my heart. This is when I re-submitted my application for conscientious objector. (A-84)

The explanation itself shows that Johnson was not attempting to reap a government benefit and then seek a discharge once the benefits had ended. There is no suggestion in the record that the training he received would in any way benefit Johnson outside the Navy.

The timing of an application alone is not sufficient to sustain the Navy's denial of claim of conscientious objection. Ferrand v. Seamans, 488 F.2d 1386, 1390 (2nd Cir. 1973); Bortree v. Resor, 445 F.2d 776, 784-85 (D.C. Cir. 1971). The timing of Johnson's application, well explained, does not create a basis in fact for finding insincerity.

B) The District Court Erred When It Incorporated The First Statement Of Reasons To Explain The Second Statement Of Reasons.

As argued previously, it is Petitioner's position that a reviewing court is limited by the statement of reasons given by the Chief of Naval Personnel. U.S. ex rel Checkman v. Laird, 469 F.2d 773 (2nd Cir. 1972). The District Court below attempted to interpret the statement of reasons given on January 22, 1976, by referring to the first statement of reasons given June 4, 1975. After the first statement of reasons was written, Johnson brought his habeas corpus action. The Government then moved, and the Court agreed, to remand the case

to the Navy for reconsideration because the Chief of Naval Personnel had applied an incorrect standard of law in refusing to approve Johnson's application. When the Navy reconsidered, it wrote a new, entirely different, statement of reasons.

The first statement of reasons appears to rest upon the question of whether Johnson's beliefs legally qualified as religious beliefs opposed to war in any form, and upon whether his beliefs were held with the strength of traditional religious beliefs. (A-10) The second statement of reasons raises questions of sincerity only, not the legal sufficiency of the beliefs. The second statement of reasons, coming in response to a remand by the United States District Court for reconsideration, must stand or fall independently.

The second statement of reasons makes no reference to the strength of Johnson's convictions. The District Court, however, found that "the phrase 'not sincere in your asserted beliefs of conscientious objection,' used by the Chief of Naval Personnel in his second letter encompasses his earlier reasons concerning the 'strength and conviction' of petitioner's beliefs." (A-25 fn2) In so doing, it is submitted, the Court erred: there is nothing in the second set of reasons to suggest that it incorporates the first, or that the words do not mean what they say. The second statement makes no reference to the depth or strength of Johnson's beliefs, but only raises the question of sincerity. To go beyond the question of sincerity, as the District Court did, is to do what this Court in Checkman, supra, said was impermissible.

C) The Fact That An Enlisted Man Would Perform His Military Obligation, Rather Than Go AWOL Or Break The Law In Some Other Way, Were His Application For A Conscientious Objector Discharge To Be Denied, Does Not Support A Finding That The Applicant Lacked Religious Conviction.

Even if the first statement of reasons is incorporated into the second, the District Court considered an improper factor in assessing Johnson's convictions. Johnson indicated that he would perform his military duties if his application was denied. (A-63, A-70) The District Court searched the record for this fact, because it was not contained in the statement of reasons, and then considered it an appropriate factor in evaluating the strength of Johnson's beliefs. The court said, "Petitioner's statement to the investigating officers that he would do the job he was trained for until the end of his enlistment if his request for conscientious objector status was denied indicates that petitioner is not one of 'those whose conscience, spurred by deeply held moral, ethical or religious beliefs, would give them no rest or peace if they allowed themselves to become a party of an instrument of war.' " (A-21 -- A-22)

There is no question that Johnson's beliefs were not articulated as if he were a divinity student. One does not, however, have to be a "St. Augustine or a Thomas Acquinas to qualify as a conscientious objector." Kemp v. Bradley, 457 F.2d 627, 629 (8th Cir. 1972); Helwick v. Laird, 438 F.2d 959, 964 (5th Cir. 1971). Johnson never claimed to be well-read and his own beliefs may very well seem shallow and unclear compared to one learned in theology. Clarity, however, never has been the test. Peckat v. Lutz, 451 F.2d 366, 369 (4th Cir. 1971). In all his statements, unclear as they may be,

Johnson has consistenly explained that continued military service would violate his fundamental religious beliefs and he would have no moral rest or peace if he were made to remain in the Navy. (A-68 -- A-72, A-82 -- A-85)

It has never been the law that an applicant must be prepared to desert to obtain an in-service conscientious objector discharge, just as it has never been the law in selective service cases that a registrant be prepared to refuse to submit to induction if his conscientious objector application is denied. No court has held that a Selective Service registrant who submits to induction and then brings a habeas corpus action is insincere in his conscientious objector claim. The same is true for in-service discharge applications.

To require an enlisted man to become a deserter is asking too much, yet that is what the District Court would, in effect, ask of this young man.

CONCLUSION

Because the Chief of Naval Personnel found insincerity where none existed, his decision, and the decision below which was based upon it, must be reversed.

RESPECTFULLY SUBMITTED,

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CERTIFICATION

I hereby certify that on September 29, 1976, a copy of the foregoing Brief was mailed first class, postage prepaid, to the Office of the United States Attorney, 270 Orange Street, New Haven, Connecticut.

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